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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 194

MARYLAND CASUALTY COMPANY, PETITIONER,

vs.

PACIFIC COAL & OIL COMPANY, AND JOE ORTECA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 1, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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[fol. 1]

[Caption omitted]

**IN UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF OHIO, EASTERN DIVISION****No. 5760. Equity****MARYLAND CASUALTY COMPANY, a Corporation,****vs.****PACIFIC COAL & OIL COMPANY and JOE ORTECA****[fol. 2] PETITION FOR DECLARATORY JUDGMENT—Filed Au-
gust 3, 1938**

Now comes the Maryland Casualty Company and avers that it is a corporation organized and existing under and by virtue of the laws of the State of Maryland and qualified to do an insurance business in the State of Ohio, having its principal place of business in said state and being a citizen and resident thereof. Plaintiff complains of the defendants, Pacific Coal & Oil Company and Joe Orteca, both of whom are citizens and residents of the City of Cleveland and State of Ohio, and residents of the Eastern Division of the Northern District of Ohio.

Plaintiff avers that this action is brought under 28 U. S. C. A. 400, there being an actual controversy among the parties, and avers that this Court has jurisdiction, there being diversity of citizenship and the amount involved exceeding the sum and value of \$3,000.00, exclusive of interest and costs.

Plaintiff further avers that it issued its policy of insurance No. 15-366825 to the defendant, Pacific Coal & Oil Company, wherein it was agreed upon certain conditions to pay on behalf of said insured all sums which said insured might become obligated to pay for bodily injuries caused by automobiles hired by it up to \$10,000, and wherein it was likewise agreed to pay on behalf of said insured all sums which insured might become obligated to pay for damage to or destruction of property up to \$5,000.00; avers that among the terms and conditions in said policy contained is the following, being a rider attached to and made a part of said policy:

"In Consideration of the premium herein provided for, and of the Named Assured's agreements herein contained, it is hereby understood and agreed by and between the Company and the Assured named in the Policy to which this Endorsement is attached, that the Policy, subject otherwise to all its terms, limits, conditions, and agreements, shall from and after the date hereof cover as to Public Liability or Public Liability and Property Damage all automobiles and trailers of the type stated in the Policy, hired by him during the Policy term and used for the purposes stated in the Policy, without a specific description of, and specific premium charge for, each automobile to be covered as required by the Policy, excluding, however, automobiles and trailers owned by employees who are paid a specific operating allowance of any kind, for the use of their automobiles in the [fol. 3] Named Assured's business (operating allowance meaning rate per mile; gas, oil, tire or upkeep allowance; where the salary, commission or terms of employment contemplate the use of an automobile or motorcycle), and excluding automobiles or trailers owned by a partner if the Assured is a partnership or by an officer if the Assured is a corporation.

"The Named Assured shall upon delivery of the Policy pay to the Company an advance premium computed on the basis of the amount estimated by the Named Assured to be incurred for the hire of such automobiles and trailers during the Policy term, applied to the rates indicated in the Schedule below. The earned premium for this Endorsement shall be adjusted at the termination of the Policy, and shall be based upon the amount actually incurred (whether paid or not) by said Assured for the hire of such automobiles and trailers at the rates indicated in the Schedule per \$100.00 of the incurred amount. If the premium so determined is greater than the advance premium, the Named Assured shall immediately pay the difference to the Company; if less, the Company shall return the unearned portion to the said Assured, but the Company shall in any event retain the minimum premium hereinafter stated.

"It is further understood and agreed, both for purposes of arriving at the advance premium and also of computing the actual earned premium, that the amount incurred by the Named Assured during the Policy term for the hire of automobiles and trailers shall include the wages of the said Assured's chauffeurs employed in operating the hired auto-

mobiles, provided such automobiles are hired without chauffeurs in attendance, and shall exclude any specific operating allowance paid to employees for the use of their own automobiles in the Named Assured's business.

"It is further understood and agreed that the Named Assured shall maintain for each location a complete and accurate record of the number and kind of automobiles and trailers hired, dates when they are hired, the amount incurred for such hire, and the names of the parties from whom such automobiles and trailers are hired.

"It is further understood and agreed that the Company or any of its duly authorized agents shall be permitted at any [fol. 4] reasonable time during the term of this insurance and within one year after its termination to audit and examine any and all of the Named Assured's records for the purpose of ascertaining the premium for this Endorsement, and the Company or its representatives shall also be permitted to inspect at any reasonable time the automobiles and trailers covered hereby.

"It is further understood and agreed that nothing herein or in the Policy contained shall extend the Policy to cover the legal liability of any individual, firm or corporation from whom automobiles and/or trailers covered hereunder shall have been hired. * * * *

Plaintiff further avers that on or about the 24th day of February, 1936, a collision occurred between an automobile driven by the defendant, Joseph Ortega, and a 1931 one and a half ton Ford truck of the Pacific Coal & Oil Company operated by one of its said employees, as a result of which the defendant, Joe Ortega, claims to have sustained certain injuries and damage; avers that the defendant, Joe Ortega, has filed an action against the Pacific Coal & Oil Company in the Court of Common Pleas of Cuyahoga County, being Cause No. 473,131 and entitled "Joe Ortega, Plaintiff, v. the Pacific Coal & Oil Company, Defendant," wherein judgment is prayed for in the amount of \$25,250.00 for injuries and damage resulting from said collision.

Plaintiff further avers that the defendant, Pacific Coal & Oil Company, claims to have sold said 1931 truck, prior to the collision above referred to, to its employee who was then operating said truck, retaining title, however, to said truck as security for the payment of the purchase price

thereof; avers that if said 1931 Ford truck was owned by the Pacific Coal & Oil Company at the time of said collision plaintiff has no obligation under its policy No. 15-366825 for or arising out of the collision above referred to; avers that if said 1931 Ford truck was a hired automobile within the meaning of the terms of the rider attached to and made a part of said policy No. 15-366825 then plaintiff would be obligated to defend the said Pacific Coal & Oil Company in the action pending in the Court of Common Pleas of Cuyahoga County and would be liable under its policy to pay any judgment which might be recovered in said action within the limits of its coverage.

Plaintiff further avers that there is an actual controversy between plaintiff and the defendants as to its obligation under said policy; avers that said controversy in [fol. 5] involves the question of whether or not said 1931 Ford truck involved in the collision above referred to was a hired automobile within the meaning of the above quoted policy provision; avers that upon the facts and the policy provisions above stated plaintiff does not know whether it is obligated to defend the said Pacific Coal & Oil Company in the action pending in the Cuyahoga County Court of Common Pleas, and therefore asks to have its rights determined.

Plaintiff further avers that, pending the determination of the issue herein presented, it is entitled to an order which will restrain and enjoin the defendants from proceeding with the trial of the issues presented in their case aforesaid pending in the Court of Common Pleas of Cuyahoga County, in the absence of which the plaintiff herein may and will suffer irreparable loss and damage for which it has no adequate remedy at law.

Wherefore plaintiff prays that this court adjudge whether or not it is obligated under its said policy and declare the rights of the parties herein; that a temporary restraining order or a temporary injunction, or both, upon appropriate application or applications be granted whereby, pending the final determination of this cause, the defendants will be restrained and enjoined from proceeding with the trial of the issues between them in the cause pending in the Common Pleas Court of Cuyahoga County, being Case No. 473,131, and entitled "Joe Ortega, Plaintiff, vs. the Pacific Coal & Oil Company, Defendant"; and for such other and further relief as is just and equitable in the premises, including a

judgment for the costs assessable and later assessed in this action.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff.

(Duly Verified.)

[fol. 6] IN UNITED STATES DISTRICT COURT

DEMURRER BY JOE ORTECA TO THE PETITION OF PLAINTIFF—
Filed August 15, 1938

The defendant, Joe Ortega, now comes and respectfully demurs to the petition for Declaratory judgment herein filed, for the reason that no cause for action is stated in said petition as against him and also for the reason that he is not a necessary or proper party to said action.

By G. E. Romano and E. J. Thobaben, Attorneys for Joe Ortega.

NOTICE

Plaintiff will take notice that defendant Joe Ortega has filed his demurrer to plaintiff's petition and that the same will be heard by the Court under the rules of said Court.

G. E. Romano, E. J. Thobaben, Attorneys for Defendant, Joe Ortega.

Notice of the filing of the foregoing demurrer is hereby acknowledged by receipt of copy of said notice and the demurrer.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, PACIFIC COAL & OIL COMPANY—
Filed August 17, 1938

Now comes the Defendant, Pacific Coal & Oil Company, and avers that it is a corporation organized and existing

under the laws of the State of Ohio, and admits the following:

[fol. 7] The corporate existence of the Plaintiff and its authority to do business in the State of Ohio;

The residence of its co-defendant;

That there was issued to it policy referred to in said Petition containing the terms and conditions shown in the rider attached to said policy and as set forth in Plaintiff's Petition;

That there is a diversity of citizenship involved in this cause and that the amount involved exceeds the sum and value of Three Thousand (\$3000.00) Dollars exclusive of interest and costs;

That on or about the 24th day of February, 1936, the collision referred to in Plaintiff's Petition occurred resulting in an action being filed against this Answering Defendant in the Common Pleas Court of Cuyahoga County bearing the number, title and the amount shown in said Petition.

This Defendant avers that on December 15th, 1935, prior to the date of the alleged collision, it sold said truck to one Walter Burke and agreed to engage him, as its need arose, to use said truck and said Walter Burke as a hired truck-man in the delivery of coal for this Answering Defendant and at the time of sale it was agreed that this Answering Defendant retain title of the truck as security for the payment of the balance of the purchase price thereof;

Denies that it owned said truck at the time of the collision.

This Answering Defendant says that only by reason of Plaintiff's refusal to defend the action instituted in the Common Pleas Court of Cuyahoga County and its rejection of its obligation under said policy and to pay any judgment that may be rendered against this Answering Defendant does the controversy exist.

Wherefore, this Answering Defendant prays that this court adjudge Plaintiff obligated under its policy and for such other and further relief as is just and equitable in the premises and that the costs be assessed against said Plaintiff.

Sol Edgert and B. J. Edgert, Attorneys for Pacific Coal and Oil Company.

(Duly verified.)

[fol. 8] IN UNITED STATES DISTRICT COURT

RULING ON DEMURRER—September 12, 1938

Ruling: "The demurrer will be sustained. Until and unless the defendant Ortega shall have recovered a judgment against defendant Pacific Coal & Oil Company, the question of the plaintiff's obligation under its policy is not presented. A court of competent jurisdiction already has pending before it a suit to determine the Pacific Coal & Oil Company's liability to the defendant Ortega. To permit the plaintiff to proceed with a declaratory judgment suit here is tantamount to depriving the State Court of its jurisdiction and a transferring of the litigation to this court. The Federal Declaratory Judgment Statute was designed to curtail litigation, not to increase it. The fact question of whether the Ford truck was owned or hired by the defendant may never arise and, in any event, the defendant Ortega has the right to a determination of all questions of liability in the forum of his choice. Certainly, the plaintiff is not put to great burden to decide whether it should defend under the terms of its policy. This court had something to say in respect of this general type of proceeding in the recent case of Employers' Liability Assurance Corporation vs. Ryan, et al., No. 5471 in Equity. Exceptions to Plaintiff."

Jones, J.

September 12, 1938.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER OF DEFENDANT JOE ORTEGA TO
PETITION OF PLAINTIFF FOR DECLARATORY JUDGMENT—Entered
September 12, 1938.

This day this cause came on to be heard on the demurrer of defendant Joe Ortega to the petition for declaratory judgment, and was submitted to the court; on consideration thereof the court sustained said demurrer, to which ruling of court plaintiff by its attorneys excepts.

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER OF JUDGMENT—Entered October 3, 1938

This cause came on for further hearing this 3rd day of October, 1938, and defendant, The Pacific Coal & Oil Company, is hereby given leave to withdraw its demurrer and refile its answer heretofore filed in this case, and the entries dated September 27, 1938, sustaining the demurrer of The Pacific Coal & Oil Company and entering judgment in favor of both defendants are hereby vacated.

Plaintiff having elected to plead no further, it is Ordered, Adjudged and Decreed by the Court that judgment be and it is hereby entered in favor of the defendant, Joe Ortega, he to recover of and from plaintiff his costs herein. To which order and judgment the plaintiff duly excepts.

Jones, Judge.

Approved and notice by the Court hereby waived.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff; Edgert & Edgert, Attorneys for Defendant, The Pacific Coal & Oil Company; G. E. Romano and E. J. Thobaben, Attorneys for Defendant, Joe Ortega.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 1, 1938

Notice is hereby given that the Maryland Casualty Company, plaintiff herein, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this action, as against plaintiff and in favor of the defendant, Joe Ortega, on October 3, 1938.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company, 1250 Terminal Tower Building.

[fol. 10] Bond on appeal for \$250.00 approved and filed Dec. 1, 1938, omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD—Filed
December 1, 1938

The following portions of the record and proceedings are to be contained in the record on appeal:

- (1) Petition;
- (2) Demurrer of Joe Ortega to petition;
- (3) Answer of The Pacific Coal & Oil Company;
- (4) The ruling of the Court dated September 12, 1938;
- (5) Order dated October 3, 1938;
- (6) Notice of appeal, together with the filing date;
- (7) Designation;
- (8) Plaintiff-appellant's statement of points.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company.

Service of the above Designation is hereby acknowledged by receipt of copy this 30th day of November, 1938.

Sol Edgert and B. J. Edgert, Attorneys for Defendant-Appellee, The Pacific Coal & Oil Company; G. E. Romano, and E. J. Thobaben, Attorneys for Defendant-Appellee, Joe Ortega.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS—Filed December 1, 1938

Notice is hereby given that Maryland Casualty Company, appellant herein, on this appeal intends to rely upon the question of law raised by the sustaining of the demurrer of the defendant-appellee, Joe Ortega, and the entering of judgment in favor of the defendant-appellee, Joe Ortega, as its only point.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company.

[fol. 12] Service of the above statement of points is hereby acknowledged by receipt of copy this 21st day of November, 1938.

Sol Edgert and B. J. Edgert, Attorneys for Defendant-Appellee, The Pacific Coal & Oil Company; G. E. Romano and E. J. Thobaben, Attorneys for Defendant-Appellee, Joe Ortega.

IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed
December 9, 1938

In accordance with Section 6 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause as set forth in the designation of record on appeal without further comparison by the clerk.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company; Sol Edgert and B. J. Edgert, Attorneys for Defendant-Appellee, The Pacific Coal & Oil Company; G. E. Romano and E. J. Thobaben, Attorneys for Defendant-Appellee, Joe Ortega.

[fols. 13-14] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 15] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—March 6, 1940

Before Hicks, Allen and Hamilton, JJ.

This cause is argued by Parker Fulton for Appellant and by E. J. Thobaben for Appellees and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered April 8, 1940

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 16] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 8, 1940

Before Hicks, Allen and Hamilton, Circuit Judges

ALLEN, Circuit Judge.

The sole question here is whether the District Court erred in sustaining a demurrer to appellant's petition for a declaratory judgment filed under the provisions of Section 400, Title 28, U. S. C.

Appellant issued a liability policy to the Pacific Coal & Oil Company under which it was obligated to defend all actions brought against the assured and, within the limitations of the policy, to pay all sums for which the assured should be liable for property damage or bodily injuries caused by automobiles hired by the assured. While the policy was in effect, appellee Ortega, driving his automobile, collided with a 1931 Ford truck operated by an employee of the Coal Company. Ortega brought suit against the Coal Company in the Common Pleas Court of Cuyahoga County, Ohio, but this action has not proceeded to judgment. The case is thus differentiated from Employees' Liability Assur. Co. v. Ryan, 109 Fed. (2d) 690 (C. C. A. 6).

Appellant brought the instant action in the District Court against the assured and Ortega, asking that the court determine appellant's obligation under the policy and decide whether it is obligated to defend the pending action in the state court. The petition alleged that the Coal Company claims to have sold the 1931 Ford truck to its employee who was operating it at the time of the accident the Coal Company retaining title thereto as security for the payment of the purchase price. If the truck was owned by the company, and was not a hired automobile, appellant claims to have no obligation under the policy. Ortega demurred to the petition in the District Court for the reason that no cause of action against him is stated, and that he is not a necessary or proper party to the action, and the demurrer was sustained.

The determinative factor is whether a controversy exists between Orteca and appellant.

[fol. 17] We think that the judgment of the District Court must be affirmed, upon the ground that no cause of action was stated against Orteca. The controversy which gives jurisdiction to the federal court under the Declaratory Judgment Act does not arise where one claiming that a right or interest is invaded by another has not chosen to assert his right. *E. W. Bliss Co. v. Cold Metal Process Co.*, 102 Fed. (2d) 105, 108 (C. C. A. 6). Orteca does not at present claim a right or interest against appellant, which is not a party to Orteca's action in the state court. No judgment has been rendered in that action against the Coal Company, hence the jurisdictional prerequisites for the filing of the supplemental petition against appellant provided for under Section 9510-4, General Code of Ohio, do not exist. While the circumstances contain "all the elements out of which a controversy may arise" (*E. W. Bliss Co. v. Cold Metal Process Co.*, *supra*), as between Orteca and appellant the controversy has not yet arisen.

We do not pass upon the question of appellant's right to a declaratory judgment against the assured, as that question is not presented in this appeal.

The judgment is affirmed.

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44543, U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 194. Maryland Casualty Company, Petitioner, vs. Pacific Coal & Oil Company, and Joe Ortega. Petition for writ of certiorari and exhibit thereto. Filed July 1, 1940. Term No. 194 O. T. 1940.

(719)